Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

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"Tort Claims Act" applies to contracts. Under the so-called "Torts Claims Act" (*Gov. Code* §905), a claim must be filed before suit can be initiated against a governmental entity. In spite of the name commonly assigned to the act, the procedure is not limited to tort claims but includes contract claims as well. In affirming the Court of Appeal on this issue, the California Supreme Court suggested that the act be referred to as the "Government Claims Act" to avoid the confusion resulting from the misnomer which had been adopted in many appellate opinions. *City of Stockton v. Sup.Ct. (Civic Partners Stockton, LLC)* (Cal.Supr.Ct.; December 3, 2007) 42 Cal.4th 730, [171 P.3d 20, 68 Cal.Rptr.3d 295, 2007 DJDAR 17723].

Participate In The Discussion Board Excitement

See what all the excitement is about! We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion.

If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board.

Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with. Go to: http://members.calbar.ca.gov/discuss to explore the new bulletin board feature—just another benefit of Litigation Section membership.

Remember to first fill out the Member Profile to get to the Discussion Board!

Mere conversation that does not contemplate retention of the lawyer is not enough to create conflict. Although the court recognized that once a lawyer receives confidential information from a prospective client, a conflict of interest may prohibit her or him from accepting adverse representation, *Med-Trans Corp. v. City of California City* (Cal. App. Fifth Dist.; October 30, 2007) 156 Cal.App.4th 655, [68 Cal.Rptr.3d 17, 2007 DJDAR 16357]. held that a mere conversation where there was no intention to retain the lawyer did not create such a conflict. The Appellate Court reversed the trial court's order disqualifying the lawyer.

Primary assumption of risk also applies to passengers. Under the doctrine of primary assumption of risk, participants in sporting activities are not liable for mere negligence unless their conduct increases the risk beyond that inherent in the sport. *See, Knight v. Jewett* (1992) 3 Cal.4th 296, [834 P.2d 696, 11 Cal. Rptr.2d 2]. When Rachel Truong was killed when a personal watercraft on which she was a passenger collided with a similar vessel operated by Cu Van Nguyen, her parents sued for wrongful death. The Court of Appeal affirmed a summary judgment in favor of the defendant, holding that the doctrine applied, not only to the operator of the water craft but also to his passenger. *Truong v. Nguyen* (Cal. App. Sixth Dist.; November 6, 2007) 156 Cal.App.4th 865, [67 Cal.Rptr.3d 675, 2007 DJDAR 16643].

Foreign country judgment is subject to 10-year statute of limitations. *Civ.Proc.* §337.5(3) provides that an action on a judgment rendered by a United States or sister state court must be commenced within 10 years from the finality of that judgment. *Guimaraes v. Northrop Grumman Corporation* (Cal. App. Second Dist., Div. 8; October 30, 2007) (As mod. November 19, 2007, upon denial of rehearing) 156 Cal.App.4th 644, [67 Cal.Rptr.3d 443, 2007 DJDAR 16353] held that the same statute also applied to a judgment rendered by the court of a foreign country (Brazil). The court rejected defendant's argument that the four year "catchall" statute of limitations (*Civ.Proc.* §343) applied.

Note: Effective January 1, 2008, California adopted the Uniform Foreign-Country Money-Judgments Recognition Act. (*Civ.Proc.* §§ 1713 ff.) It requires that an action to recognize a foreign-country judgment shall be commenced within the *earlier* of the time during which the *foreign-country* judgment is effective in the foreign country, or 10 years from the date that the foreign-country judgment became effective in the foreign country.

Lapsed limitation period not extended where non-perpetrator defendant did not know of the sexual offense. *Civ.Proc.* §340.1 extends the statute of limitations for a sexual abuse victim who sues a non-perpetrator who would be legally responsible for the conduct of the perpetrator beyond the victim's 26th birthday. But this time extension only

Model Code of Civility and Professionalism

As Litigation Section members you can review the Model Code of Civility and Professionalism. We encourage you to do so and post your comments on the Discussion Board at http://members.calbar.ca.gov/discuss

applies if the non-perpetrator "knew or had reason to know, or was otherwise on notice" of the perpetrator's conduct. In *Doe v. City of Los Angeles* (Cal.Supr.Ct.; November 1, 2007) 42 Cal.4th 531, [169 P.3d 559, 67 Cal.Rptr.3d 330, 2007 DJDAR 16417], plaintiffs, in their 40's sued the city alleging childhood sexual abuse by a police officer. Because they were unable to plead that the city was on notice of the officer's conduct, the California Supreme Court affirmed the dismissal of the action.

Denial of motion for reconsideration is not appealable. After the trial judge issued an injunction (an appealable order), defendant moved for reconsideration. The court denied reconsideration. Defendant then appealed from the latter order. The Court of Appeal dismissed the appeal. The denial of reconsideration is not an appealable order. *Morton v. Wagner (*Cal. App. Sixth Dist.; November 7, 2007) (As mod. Dec. 7, 2007) 156 Cal.App.4th 963, [67 Cal.Rptr.3d 818; 2007 DJDAR 16734]. Plaintiff should have appealed from the injunction but failed to do so within the required time period.

Filing of "notice of unavailability" has no legal significance. Finding the conduct to be in bad faith, *Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299, [10 Cal.Rptr.2d 371], upheld the award of sanctions against a lawyer who purposefully set discovery at times he knew the other party would be unavailable. Since that time a practice has arisen where lawyers file and serve "notices of unavailability" to notify their opponents when they will be away. But the filing of such a notice has no legal effect; it does not affect the power of the court to control its calendar nor does it lead to extensions of time. A party needing a continuance or extension of time must file the appropriate motion. *Carl v. Sup.Ct. (Coast Community College District)* (Cal. App. 4th Dist., Div. 3; November 21, 2007) 157 Cal.App.4th 73, [68 Cal.Rptr.3d 566, 2007 DJDAR 17331].

Note: This does not mean that it may not be a good idea, particularly for a sole practitioner, to let opposing counsel know when you will be out of the office. *Carl* did not disagree with the holding in *Tenderloin Housing* that the scheduling of matters when it is known that the opposing lawyer is unavailable may be bad faith.

CCP § 998 offer must specify explicitly whether costs and fees are included. Plaintiff accepted a *Civ.Proc.* §998 statutory offer to settle. The offer contained a broadly worded release clause. This was insufficient to preclude plaintiff from obtaining attorney fees and costs. The Court of Appeal adopted a "bright line rule," unless the §998 offer *expressly* states that fees and costs are included, the right to such relief is available if the trial court determines that the offeree was the prevailing party.

The anti-SLAPP statute is not an immunity statute. The anti-SLAPP statute (*Civ.Proc.* §425.16) provides an expedited procedure to review the merits of plaintiff's case if the case arises out of certain constitutionally protected activities. But even if plaintiff's claim is covered by the statute, defendant's motion must be denied where plaintiff presents admissible evidence supporting a prima facie case. *See, Midland Pacific Building Corp. v. King* (Cal. App. Second Dist., Div. 6; November 28, 2007) 157 Cal.App.4th 264, [68 Cal.Rptr.3d 499, 2007 DJDAR 17500].

How not to write an appellate brief. The Ninth Circuit struck appellant's brief, characterizing it as "a slubby mass of words rather than a true brief." To learn how not to write an appellate brief, read *Sekiya v. Gates* (9thCir.; November 29, 2007) 508 F.3d 1198, [2007 DJDAR 17615].